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No. 99-1209

# In the Supreme Court of the United States

NOVATO FIRE PROTECTION DISTRICT, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether a local fire protection district, which has an obligation under state law to provide services to all entities within its borders, may, to avoid providing services to a tax-exempt federal property, redraw its borders to exclude the federal property and impose on the federal government a fee for fire protection services in "an amount equivalent to the revenue the District would receive were the [federal property] on [the] tax rolls." Pet. App. 6a.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Carpenter* v. *Shaw*, 280 U.S. 363 (1930) | 6, 8 |
| *City of Cincinnati* v. *United States*, 39 Fed. Cl. 271 (1997), aff'd, 153 F.3d 1375 (Fed. Cir. 1998) | 9-10 |
| *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) | 7 |
| *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) | 5 |
| *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976) | 9 |
| *Printz* v. *United States*, 521 U.S. 898 (1997) | 14 |
| *United States* v. *City of Columbia*, 914 F.2d 151 (8th Cir. 1990) | 9 |
| *United States* v. *City of Detroit*, 355 U.S. 466 (1958) | 7 |
| *United States* v. *City of Huntington*, 999 F.2d 71 (4th Cir. 1993) | 9, 14 |
| *United States* v. *County of Allegheny*, 322 U.S. 174 (1944) | 7, 8, 9, 14 |
| *United States* v. *New Mexico*, 455 U.S. 720 (1982) | 5, 7 |
| *Washington* v. *United States*, 460 U.S. 536 (1983) | 10, 11 |


Constitution and statutes:


| | |
|---|---|
| U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) | 6 |
| 12 U.S.C. 531 | 13 |

Statutes—Continued: Page

12 U.S.C. 1452(e) ..... 13
15 U.S.C. 713a-5 ..... 13
15 U.S.C. 2210 ..... 11, 12, 14
15 U.S.C. 2210(a) ..... 11, 12
15 U.S.C. 2210(b) ..... 11, 12, 13
31 U.S.C. 6902 (1994 & Supp. IV 1998) ..... 13
31 U.S.C. 6902(a)(1) (Supp. IV 1998) ..... 13
Cal. Gov't Code (West 1966):
§ 54774 (& Supp. 1976) ..... 3
§§ 56000-56550 ..... 3
§ 56038 ..... 3
§ 56252(b) ..... 5, 10
§ 56316 (& Supp. 1976) ..... 4-5, 10
§ 56316(a)(1) (& Supp. 1976) ..... 5
Cal. Health & Safety Code (West 1994):
§ 13811 ..... 14
§ 13821 (1964) ..... 14

Miscellaneous:

60 Comp. Gen. 637 (1981) ..... 13

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 181 F.3d 1135. The opinion of the district court (Pet. App. 13a-22a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. A petition for rehearing was denied on September 21, 1999. Pet. App. 23a. On December 6, 1999, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 20, 2000. The petition for a writ of certiorari was filed on January 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under California law, fire protection services are generally provided by Fire Protection Districts. Pet. App. 7a-8a & n.4. The Novato Fire Protection District (NFPD or District) has an obligation under California law to provide fire protection and emergency medical services to all entities located in the District, which is in Marin County, California. *Id.* at 8a, 13a.

In the 1930s, the United States acquired Hamilton Field and built the Hamilton Air Force Base on the property, which is located in Marin County. Pet. App. 2a, 13a. Until the base was decommissioned in 1974, the federal government provided its own primary fire protection services on the base, and NFPD provided secondary response services. *Id.* at 2a, 9a. After the base was decommissioned, the Navy (which became the principal occupant of the property) sought to obtain NFPD's primary fire protection services. *Id.* at 2a.

NFPD entered into a contract with the Navy to provide primary fire protection services on the base. The contract required the federal government to pay a fee for fire protection services. Pet. App. 2a. NFPD was aware both that the base was within the district's geographical boundaries and that, as federal property, the base was exempt from state taxation. *Id.* at 9a; Court of Appeals Excerpts of Record (C.A. E.R.) 132. The fee specified in the contract, however, was not calculated based on the cost of providing fire protection services to Hamilton Field. Instead, the contract required the Navy to pay NFPD "an amount equivalent to the revenue the District would receive were the Navy on property tax rolls." Pet. App. 6a.

Concerned that this charge might constitute an impermissible tax on the federal government because of

NFPD's pre-existing state-law duty to provide fire protection services within the District, NFPD sought to eliminate the problem by redrawing the District's boundaries to exclude Hamilton Field. Pet. App. 2a-3a. NFPD therefore petitioned the Local Agency Formation Commission for Marin County (LAFCo) for permission to initiate proceedings to detach the federal property from the District. *Id.* at 3a.[1]

As LAFCo's Executive Director explained, NFPD's purpose in seeking detachment was "to insure that it will receive compensation for any services it provides to the currently tax exempt properties." C.A. E.R. 132 In addition, a resolution of NFPD's Board of Directors explained that "the reason for said proposed detachment is that the District may have the legal responsibility for providing fire protection to said territory, and said territory produces no tax revenue to District to pay for such services, which imposes an intollerable [*sic*] burden upon the remaining property owners in the District." C.A. E.R. 137-138.

In response to NFPD's petition, LAFCo passed a resolution approving the detachment proceedings and calling for an election to confirm NFPD's decision to exclude Hamilton Field from the District. Pet. App. 3a-4a. Despite formal objections from the Navy and the Air Force, NFPD's Board adopted a resolution in favor of detachment. *Id.* at 4a.

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[1] At the time, local agency formation commissions had the power to organize fire protection districts. See Cal. Gov't Code § 54774 (West 1966 & Supp. 1976); Pet. App. 3a nn.2-3. Detachment was governed by Cal. Gov't Code §§ 56000-56550 (West 1966) and defined as "the detachment, deannexation, exclusion, deletion or removal from a district of any portion of the territory of such district." Cal. Gov't Code § 56038 (West 1966).

The detachment issue was included on the ballot in the November 1977 local election. The votes of the residents of the federal property were not separately tallied. Marin County voters approved detachment of the federal property, and the California Secretary of State recognized the detachment. Pet. App. 4a.

From the time of the detachment until 1996, the federal government entered into annual contracts with NFPD to obtain fire protection services for Hamilton Field. Pet. App. 2a, 14a. By the terms of those contracts, the annual payment was, as it was in the original contract, in "an amount equivalent to the revenue the District would receive were the [federal property] on [the] tax rolls." *Id.* at 6a.

2. In 1996, NFPD and the United States were unable to agree on the terms of the contract for fire protection services. In response, NFPD filed suit in the Superior Court of California for the County of Marin to obtain a declaration that the detachment was valid and that, as a result, NFPD had no obligation to provide fire services to Hamilton Field. Pet. App. 4a. The United States removed the case to the United States District Court for the Northern District of California, and the parties filed cross-motions for summary judgment. *Id.* at 5a.

The district court granted the United States' motion. Pet. App. 22a. The court first held that the United States was not subject to a state-law statute of limitations in its challenge to the detachment proceedings and that the government's claim was not barred by the doctrines of waiver or estoppel. *Id.* at 16a-18a.

The court then held that the detachment was invalid because it violated two state-law requirements. Pet. App. 19a-22a. First, the court concluded that the detachment violated the version of Cal. Gov't Code

Section 56316 that was in effect in August 1977. That provision required that a detachment proceeding be abandoned if "written protests filed and not withdrawn prior to the conclusion of the hearing represent * * * [m]ore than 50 percent of the assessed value of the land therein." Cal. Gov't Code § 56316(a)(1) (West 1966 & Supp. 1976). Because the government "owned all of Hamilton Field," the court concluded that "its protest represented more than half the assessed value of the area to be detached, satisfying the requirement of section 56316." Pet. App. 20a. The court therefore ruled that "the detachment was invalid." *Ibid.*

Second, the court concluded that the detachment violated the former Cal. Gov't Code § 56252(b) (West 1966), which required that votes held in the area sought to be detached be tallied separately from the votes in the remainder of the district. Pet. App. 20a-22a. Because "such a vote did not occur in this case, the detachment was confirmed by a process that violated California municipal reorganization law, and is invalid." *Id.* at 22a.

3. The court of appeals affirmed on federal-law grounds. Pet. App. 12a. The court held that the detachment and contractual fees that NFPD charged the United States violated the federal government's constitutional immunity from state taxation. *Id.* at 5a-10a. The court explained that inter-governmental tax immunity, first recognized in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), applies only to taxes imposed on entities "so closely connected with the government that the two cannot realistically be viewed as separate entities." Pet. App. 5a (quoting *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982)). The court noted that the "parties do not dispute that the federal

occupants of Hamilton Field enjoy inter-governmental tax immunity." *Ibid.*

The court held that the contractual fees that NFPD charged the federal government constituted an unconstitutional tax. Pet. App. 5a-7a. The court explained that, "[w]hen analyzing whether a fee constitutes an impermissible tax, 'we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" *Id.* at 6a (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930)). Because the "fees that the District charged the government in exchange for continued fire and emergency medical protection were based not upon the actual cost of services provided to Hamilton Field, but rather upon the value of the property in question," the court concluded that the fees amounted to an impermissible tax. *Ibid.*

The court reached that conclusion in light of its holding that the detachment of the property violated the Supremacy Clause. Pet. App. 7a-10a. The court noted that NFPD and LAFCo acknowledged the District's "pre-existing duty to provide" fire protection services to Hamilton Field. *Id.* at 9a. The court concluded that, "under the unique circumstances of this case," *ibid.*, the detachment action "effectively g[a]ve [the] municipality a method of assessing a property tax from the federal government in exchange for the provision of any and all basic services," *id.* at 7a.[2]

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[2] Because the court of appeals found the charges and detachment invalid under federal law, the court did not address the district court's holding that the detachment was invalid under California law. Pet. App. 11a.

## ARGUMENT

The decision of the court of appeals is correct. Furthermore, the result reached by the court of appeals is, as the district court held, supported by independent state-law grounds. This Court's review is not warranted.

1. The court of appeals correctly concluded that NFPD's attempt effectively to assess an *ad valorem* tax on federal property is impermissible. That conclusion flows from two well-established principles of constitutional law. First, "possessions, institutions, and activities of the Federal Government itself in the absence of [express] congressional consent are not subject to any form of state taxation." Pet. App. 5a (quoting *United States* v. *County of Allegheny*, 322 U.S. 174, 177 (1944)); see also *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982). Second, "the constitutional immunity doctrine * * * has, from the time of *M'Culloch* v. *Maryland*, [17 U.S. (4 Wheat.) 316 (1819),] barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 812 (1989) (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

As the court of appeals explained, NFPD recognized but sought to evade those basic rules of constitutional law. Pet. App. 2a-3a, 9a; see C.A. E.R. 132. NFPD acknowledged its duty to provide fire protection services to all entities within the District, including Hamilton Field. Pet. App. 9a. Further, NFPD did not dispute that, before the 1977 detachment proceedings, Hamilton Field was within the District. *Id.* at 8a. NFPD was concerned that, because the "Hamilton properties remain publically [*sic*] owned and therein

tax exempt, they will not produce any tax revenues to the District." C.A. E.R. 132. Aware that it could not levy a direct tax on the federal properties or refuse selectively to provide fire services to those properties, NFPD sought to accomplish indirectly what it could not accomplish directly: NFPD attempted to redraw its boundaries to exclude Hamilton Field, and then sought to levy on the federal government a charge in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," Pet. App. 6a, in the hope that it could "ensure that the District would continue to receive compensation for any services it provided to the currently tax exempt properties," *id.* at 3a (internal quotation marks omitted). See also C.A. E.R. 137-138 ("[T]he reason for said proposed detachment is that the District may have the legal responsibility for providing fire protection to said territory, and said territory produces no tax revenue to District to pay for such services, which imposes an intollerable [*sic*] burden upon the remaining property owners in the District.").

In those "unique circumstances," Pet. App. 9a, the court of appeals correctly concluded that the detachment and contractual charge, when viewed together, constitute an impermissible attempt to tax the federal government. See *id.* at 5a-10a. As the court of appeals explained, "[w]hen analyzing whether a fee constitutes an impermissible tax, '[federal courts] are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" *Id.* at 6a (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930)). Looking to "the effect, not the form, of the local government action," *id.* at 7a (citing *County of Allegheny*, 322 U.S.

at 184), the court of appeals inquired whether the detachment, in conjunction with NFPD's decision to assess a contractual fee in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," *id.* at 6a, was in effect an attempt to tax the federal government.

As the court of appeals explained, the contractual fee that NFPD sought to charge the federal occupants of Hamilton Field was not based on "the actual cost of services provided" but rather the value of the property itself. Pet. App. 6a. The charge was therefore not a permissible "user fee," which is a payment "given in return for a government-provided benefit." *United States* v. *City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993); cf. *United States* v. *City of Columbia*, 914 F.2d 151 (8th Cir. 1990) (holding that city utility fee not an impermissible tax). Instead, by assessing the fee in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," Pet. App. 6a, NFPD levied an *ad valorem* property tax on the United States. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 287 (1976) ("[*Ad valorem*] property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth.").

This Court has made clear that a State or locality violates the Supremacy Clause when the "substance" of its action "is to lay an ad valorem general property tax on property owned by the United States." *County of Allegheny*, 322 U.S. at 185, 192; accord *City of Huntington*, 999 F.2d at 74; *City of Cincinnati* v. *United States*, 39 Fed. Cl. 271, 274 (1997) (storm drainage charge constitutes impermissible tax because it "is based upon the size and the development intensity of the commercial property owned by the federal govern-

ment, and not on the services actually used"), aff'd, 153 F.3d 1375 (Fed. Cir. 1998). The court of appeals here thus correctly concluded that the detachment proceedings and contractual assessment constituted an impermissible attempt to tax the United States.

2. Review of the decision in this case would be particularly inappropriate because, as the district court held, the result reached by the court of appeals is also supported by independent state-law grounds. Pet. App. 19a-22a. As the district court held (*id.* at 19a), the detachment violated the state-law requirement that a detachment proceeding be abandoned if "written protests filed and not withdrawn prior to the conclusion of the hearing represent * * * [m]ore than 50 percent of the assessed value of land therein." Cal. Gov't Code § 56316 (West 1966 & Supp. 1976). Because the federal government's "protest represented more than half the assessed value of the area to be detached," the court correctly held that "the detachment was invalid." Pet. App. 20a.

The district court also concluded that the detachment violated the separate-tallying requirement of former Cal. Gov't Code § 56252(b) (West 1966). Pet. App. 20a-22a. Because separate votes "did not occur in this case, the detachment was confirmed by a process that violated California municipal reorganization law, and is invalid." *Id.* at 22a. Because the detachment was invalid, NFPD continues to have an obligation to provide fire services to Hamilton Field.

3. None of the reasons advanced by petitioner justifies this Court's review of this case.

a. Petitioner's contention (Pet. 11, 13) that the decision of the court of appeals conflicts with *Washington* v. *United States*, 460 U.S. 536 (1983), is incorrect. In *Washington*, this Court upheld a sales and use tax that

the State imposed on "contractors that work for the federal government." *Id.* at 539. The Court reaffirmed, however, the long-standing rule that a State may not lay a tax *directly* on the United States. *Id.* at 540. The charge imposed by NFPD in this case was imposed not on a third party but directly on the federal government.

b. Petitioner also errs in contending (Pet. 14-15) that Congress waived the government's immunity from liability for the NFPD charge by enacting 15 U.S.C. 2210. The court of appeals did not discuss Section 2210 in its opinion, and that statute has no bearing on the question presented by the petition.

Section 2210 provides:

> **Reimbursement for costs of firefighting on Federal property**
>
> **(a) Filing of claims**
>
> Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire. The claim shall include such supporting information as the Administrator may prescribe.
>
> **(b) Determination**
>
> Upon receipt of a claim filed under subsection (a) of this section, the Administrator shall determine—
>
> (1) what payments, if any, to the fire service or its parent jurisdiction, including taxes or payments in lieu of taxes, the United States

> has made for the support of fire services on the property in question;
>
> (2) the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs, in connection with the fire which is the subject of the claim; and
>
> (3) the amount, if any, of the additional costs referred to in paragraph (2) of this subsection which were not adequately covered by the payments referred to in paragraph (1) of this subsection.

15 U.S.C. 2210.

Section 2210 does not address the federal government's immunity from general, annual assessments that finance local fire protection services. Indeed, the provision does not directly address the question of intergovernmental tax immunity. As its title indicates, Section 2210 creates a mechanism to reimburse state and local governments for expenses that they actually incur in combating fires on federal property. Subsection (a) provides that state and local governments may file claims for reimbursement of direct expenses and direct losses incurred in rendering fire fighting services. Although Section 2210(b) provides that claims against the United States are to be offset by any taxes (or payments in lieu of taxes) that have been made for local fire protection services, the statute does not waive the federal government's immunity from state and local taxes. Instead, the statute merely reduces the amount of reimbursement when federal agencies or instrumentalities have, pursuant to *other* federal statutes that waive federal immunity from state and local taxation,

paid taxes that support local fire services.[3] For example, Section 2210(b) provides for a reduction in fire-control claims against Federal Reserve Banks, which must pay state and local real estate taxes under 12 U.S.C. 531. Similarly, Section 2210(b) provides for a reduction in claims against the United States when the federal government has made payments "in lieu of taxes," such as payments pursuant to federal statutes that compensate local governments for the loss of revenue occasioned by their inability to assess taxes against certain federal property located in the municipality. See 60 Comp. Gen. 637, 640 (1981). Statutes such as 31 U.S.C. 6902 (1994 & Supp. IV 1998) provide for payments by the federal government to units of local governments in which certain tax-exempt land owned by the federal government is located. Such payments, when made, may be used "for any governmental purpose." 31 U.S.C. 6902(a)(1) (Supp. IV 1998).

c. There is also no merit to petitioner's argument (Pet. 15) that the court of appeals' decision "imposes on state and local governments a constitutional obligation to provide free services to the federal government *ad*

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[3] Other federal statutes explicitly waive federal immunity from state and local taxation in specific circumstances. See, *e.g.*, 12 U.S.C. 531 ("Federal Reserve banks * * * shall be exempt from Federal, State, and local taxation, except taxes upon real estate."); 12 U.S.C. 1452(e) (The Federal Home Loan Mortgage Corporation "shall be exempt from all taxation * * * except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."); 15 U.S.C. 713a-5 (same for taxation of real property owned by Commodity Credit Corporation). As those statutes demonstrate, when Congress intends to waive federal immunity from state and local taxation, it expresses its intention clearly.

*infinitum*." The decision of the court of appeals invalidated only the particular means utilized by petitioner to seek payment and did not, for example, address whether reimbursement might be available to petitioner under 15 U.S.C. 2210, for the cost of services actually rendered. Moreover, the obligation of NFPD to provide fire services to Hamilton Field arises under state, not federal, law. See Pet. App. 8a & n.4, 13a; Cal. Health & Safety Code § 13821 (West 1964); *id.* § 13811 (1994). Although California may elect generally to restrict the availability of fire protection services, one of its localities may not, because the federal government enjoys tax immunity, evade its state-law duty to provide those services to federal properties within its borders.[4]

Likewise, a locality may not, as NFPD has here, assess an *ad valorem* tax on the United States in return for the services it is required to provide under state law. Otherwise, "virtually all of what are now considered taxes could be transmuted into user fees by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a police fee." Pet. App. 7a (quoting *City of Huntington*, 999 F.2d at 74). This Court's precedents do not allow such a result. See, *e.g.*, *County of Allegheny*, 322 U.S. at 185, 192.

d. Finally, petitioner's contention (Pet. 17) that the court of appeals' decision conflicts with *Printz* v. *United States*, 521 U.S. 898 (1997), lacks merit. Congress has not commanded the officers of NFPD to "enforce a federal regulatory program." *Id.* at 935. Instead, as noted above, the State of California has imposed on

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[4] Indeed, as noted above, the district court concluded that the detachment proceedings violated state law. Pet. App. 19a-22a.

NFPD the obligation to provide fire services within its District. Nothing in *Printz* suggests that NFPD may impose an *ad valorem* tax on federal property to fund that obligation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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